1946 (K) File No. Cr. A. DWR. 46.

Legal DEPARTMENT

Examined DPP 20-4-56. A. BRANCH

P. 27 (E) 1956

Subject:—

Criminal Appeals in the High Court Bombay against the order of acquittal, Dharwar District.

" True copy - Original papers being of bad quality - Destroyed."

Superintendent,
D Branch, Legal Department.

File No. Cr. A. Dharwar/46.

Std. Sectt. Slip 24-B

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Opinion in the case of Imperator Vs. Shankreppa Shivamurteppa Mulimani.(Accused No.2).

The District Magistrate of Dharwar has proposed an appeal against the acquittal of accused No.2 only,and only against the acquittal under Section 19(e) of the Indian Arms Act. On this point, the prosecution case is that the Police Patil and the village servants saw some carts carrying wheat and jivari out of the district in contravention of the District Magistrate's order dated 7-3-1944, which prohibited such export.Accused No.2 was one of the persons going with the carts. The Police Patil challenged the carts and ultimately arrested accused No.2, and a country pistol was found in his pocket.Accused No.2's defence was that the pistol was plantted on him while he was taken to the village chavdi,with both his hands tied at the back. The learned trial Magistrate has accepted the defence that the country pistol was planted on the accused No.2 and he, therefore,acquitted accused No.2.

Seven carts loaded with bags of wheat and jivari were seen going into another district by the Police Patil.He had his walikars with him and a large number of the villagers had also congregated in the village temple at the material time. The carts were allowed to escape,and only two persons-accused No.1 and accused No.2-were arrested. Accused No. 1 has been acquitted as the learned trial

Magistrate held that he had nothing to do with the carts on the export of the grain. What little remains is this country pistol, supposed to be found on the person of accuse No.2. There were two panchas who made the panchnama. Only one of them has been examined. The learned Magistrate points out the discrepancies in the prosecution evidence as to exactly when the pistol was discovered. Devendrappa, the injured person, says that he felt it in the pocket of accused No.2 when Devendrappa over-powered the accused. Even then, I feel that the learned Magistrate is not right in accepting the defence version that the pistol was planted on accused No.2. The prosecution has sufficiently proved that the pistol was found in the coat-pocket of accused No.2 and that he was therefore guilty under Section 19(e) of the Arms Act.

In spite of this view, I do not recommend an appeal. The Police Patil let go the real culprits who were exporting large quantities of grain. It is but poor consolation to catch hold of accused No.2 because he was found in possessior of some useless firearm and then make a scape-goat of him. Accused No. 2 is acquitted though on a wrong appreciation of evidence. But the matter is not of sufficient importance to justify an appeal under Section 417.

Bombay,
12th March 1946.

Government Pleader, High Court

Opinion in the Case of Imperator Vs. Basangouda Murigeppagouda Patil and others(Accused).

This is a case where a mountain has been made out of a mole-hill. Accused Nos. 2 and 3 owned twelve bags of Jawari and had brought them across the Tungabhadra river to Hawnur on 22-9-1944. Accused Nos. 2 and 3 did not possess any permit to transport the bags and one Hayatsaheb obstructed to the further movement of the bags. The bags were destined for Guttal. In order to avoid further complications, accused Nos. 2 and 3 agreed not to carry the bags any farther and agreed to keep them with a third party, one Govindbhat, till Hayatsaheb's obstruction was removed. Hayatsaheb's point was that as the accused Nos. 2 and 3 did not possess the requisite permit, the grain was liable to be purchased by the Mamlatdar of Haveri. On 26-9-1944, however, the accused six in number, came to the house of Govindbhat with carts and took away their own bags of Jawari. Govindbhat was not at home and the accused did not heed the protests raised by his brother Venkatesh who was in the house at that time. Assuming that the allegations of the prosecution to be true, could it be said that the accused are guilty of an offence of dacoity ? They were more than five, and removed property forcibly, in violation of an arrangement agreed to by accused Nos. 2 and 3 that the bags were to remain with Govindbhat

till the dispute between them and Hayatsaheb was resolved. The legal position, though intriguing, is clear. Hayatsaheb or Hanmantcharya (the Mamlatdar's agent on whose behalf Hayatsaheb was supposed to act) had no right or authority to detain the bags. If the accused Nos. 2 and 3 were removing grain out of the village without a permit, he could have reported the matter to proper authorities and got the grain attached. Hayatsaheb was not a Police Officer. He had no business to obstruct the passage of the grain.

Govindbhat's position is still worse. He had no title to the grain at all. He wanted to pay the role of the good Samaritan and save immediate trouble by agreeing to keep the corn in his custody. All the same, the grain belonged to accused Nos. 2 and 3. And if they wanted to take it away, either Venkatesh or any body else had no business to obstruct the accused. The accused may have committed some other offences e.g. criminal trespass or assault on Venkatesh or criminal restraint of Venkatesh. They may be guilty under the Defence of India Rules for having disobeyed the District Magistrate's order prohibiting export of grain without a permit. But I have no doubt that the accused did not cause any wrongful gain to themselves nor any wrongful loss to others. At best, the action of the accused may be said to be high handed. They may even be said to have taken the law

in their own hands. But they have not committed theft. It is conceivable that a man may commit theft of his own property. In this case, as the learned Judge has rightly put it, Govindbhat was a mere gratuitous bailee and if the accused take away their own things kept with him, it would be difficul for any court to take the view that the accused committed decoity. Village politics often prompts unnecessary prosecutions and once a prosecution is started, the substance of the thing is lost sight of. To put the whole thing in a nutshell, accused Nos. 2 and 3 not knowing what to do and to avoid the grain going into the clutches of the Mamlatdar's agent, agreed to a stop-gap arrangement. And at the first available opportunity the accused got out of a predicament of their own creation. How could they be called dacoits? Prosecute them by all means for offences which they may have committed, but dacoity is certainly not that offence.

I do not advise an appeal.

Bombay,
19th March 1946.

Government Pleader, High Court.

Opinion in the case of Imperator vs.Jandisab Advisab Bhavikatti and others.

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I advise an appeal. The learned Trial Magistrate is clearly wrong when he holds that the search warrant(Ex.1A) issued under sec.6 is bad in law, because the house actually raided bore the number 458/160 and as the sub-number was omitted from the warrant. If the description of the house in the search-warrant is such that it would enable an ordinary person to identify it, the warrant would be quite good in law see,6 Bom.L.R.52.

No doubt, there are contradictions between the contents of the panchnama and the oral evidence of the panch and the raiding police officer. In any event, if the warrant(Ex.1A) is legal, the presumption under sec.7 would arise that the place raided was being used as a common gaming house and the persons found therein were there for the purpose of gaming.

There is no doubt that the small tin trunk (article No.3) is the box referred to by Exs.3 and 4 as the box used by accused 30 to collect his share of one anna in the rupee. There is also evidence that article No.3 was by the side of accused No.29. This evidence should be sufficient for the Court to hold that atleast accused Nos.29 and 30 were running the gaming houses. The evidence involving accused Nos.1, 25 and 31 as keepers of the common gaming house seems to be hearsay. But there is no doubt that all those found in the house came within the mischief of Sec.5.

I do not see why the learned Magistrate holds that the evidence of Exs.3 and 4 is not admissible. Sec.10 is specially designed to let in their evidence Of course, their evidence has to be accepted with caution. But it cannot be said that the evidence is not admissible.

The evidence regarding the tenancy and occupat: of the house seems to be far from convincing. In any event, the ~~xxxxxxx~~ Crown has a fairly arguable case against accused Nos.29 and 30 under sec.4 and against all the accused under sec.5.

Bombay,
20th August 1945.

Government Pleader, High Court

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Criminal Appeals.
In the High Court, Bombay .....
against acquittal (Dharwar).

GOVERNMENT OF BOMBAY.
Legal Department,
Resolution No.6596
Bombay Castle, 7th September 1945.

Letter from the District Magistrate, Dharwar, No.M.P.P.S.R. 15, dated the 8th August 1945 - Forwarding papers in the case noted in the margin and requesting that an appeal under section 417 of the Dode of Criminal Procedure, 1898, may be made to the High Court, Bombay, against the order of acquittal passed by the Resident Magistrate, First Class, Gadag, on 30th April 1945x in respect of the accus d in the case noted in the margin.

In the Court of Resident Magistrate, First Class, Gadag. Criminal Case No.147 of 1944. Crown vs Jandisab Advisal Bhavikatti and 30 others ..... Accused. (Offence under sections 4 and 5 of the Bombay Prevention of Gambling Act, 1887).	

RESOLUTION - The Government Pleader, High Court, Bombay, is directed to present an appeal to the High Court, Bombay, under section 417 of the Code of Criminal Procedure, 1898, against the order of acquittal passed by the Resident Magistrate, First Class Gadag, on 30th April 1945 in respect of the accused in the case referred to.

By order of the Governor of Bombay,

Sd/- xxx

P.N.MOOS,
for Secretary to Government.

To
The Home Department,
The Commissioner, Southern Division,
The District Magistrate, Dharwar,
The Government Pleader, High Court, Bombay (with the papers of the case received with the letter of the District Magistrate, Dharwar, referred to above).

Judgment recorded by the High Court in Criminal.
iminal Appeal No. 410 of 1945 (By Govt.)

The Government Pleader for the Government of the Province of Bombay. Messrs. G. R. Madbhavi and K. R. Bengeri for accused Nos. 1, 21 and 29 to 31.

Mr. B. M. Kalagate for accused No. 27.

Mr. V. H. Gumaste for accused Nos.2 to 20, 22, 24 to 26 and 28 (Appointed).

Coram: Sen and Gajendragadkar, JJ.

5th September 1946.

Oral Judgment (Per Gajendragadkar, J.):

This is an appeal filed by the Government of Bombay against an order of acquittal passed by the Resident Magistrate, First Class, Gadag, in Criminal Case No. 147 of 1944. In the said case 31 persons were put up for trial before the learned Magistrate, 5 amongst them for an offence punishable under s. 4 of the Prevention of Gambling Act and the rest for an offence punishable under s. 5 of the said Act.

The case for the prosecution was that on the 28th April 1944 the Police Inspector, Food Supply, Dharwar, received information that a house in the street called 'Javal' at Gadag was being used as a common gaming-house for gaming in cards. The next day the said Inspector obtained a warrant from the District Superintendent of Police under s.6 of the Prevention of Gambling Act authorising him to raid a house bearing No. 458 Javal Street at Gadag. About midnight on the 29th April the said officer with a Police party and panchas raided the house and they found that card gaming was going on in which 36 persons including the present accused Nos. 1 to 30 were taking part. Accused No. 31 was not present at the time; but since in the investigation it appeared that he was one of the conductors of the business in the said common gaming-house, he was arrested on the 30th May 1944. A panchanama was made of the things that were found in the room and a list of persons present was also made. Amongst the things found were some card board coupons of four annas each printed on

them, five half cut pice pieces, a set of 53 playing cards including Joker with its carton, 2 similar packs of cards, 12 four anna card board coupons, 5 two anna card board coupons, 16 one anna card board coupons a manuscript paper of account writte in pencil, a carton of playing cards and a small tin bag kept on the upper portion of the Padasala. The said bag was locked. It had a long slit on its lid to drop coins. The key of the said hand ba was given to the Police party by one Basawanneppa Fakirappa with whom it was kept. When the lid of the hand-bag was opened with the key several articles were found inside the hand-bag. Amongst them were 15 one-rupee currency notes, 2 anna coin pieces, and five card board pieces. On the card boards it is printed as due four annas. Several amounts of money were found with seveeal other persons present. All the articles and things thus discover -ed in the room as also with the persons present were noted in the panchanama which was written on the spot. With accused No.30 were found in addition to one anna, four chits written in pencil and a note-book written in pencil, all in a leather purse. Subsequently the Police Inspector made investigation into this offence and submitted his report. As a result all the accused were arrested and a charge sheet was sent against them. As I have mentioned above accused Nos. 1, 25, 29, 30 and 31 were charged as assisting in conducting the business of a common gam--ing-house under s. 4 of the Prevention of Gambling Act. The res of the accused were charged for having committed an offence punishable under s. 5 of thw said Act.

In support of their case the prosecution relied upon the evidence of the Police Inspector and a panch who proved the panchanama. They also examined Chanabasayya and Irabhadreppa whc were present in the house at the time when the house was raided and who had been arrested along with the accused persons in this case. The prosecution alleged that the game of cards which all t accused persons were playing at the time when the place was raid it technically known as "Andar-Bahar" and they contended that al the accused were taking part in gaming and were guilty of the offences charged against them.

For the defence it was urged that the warrant under which the search and raid were effected by the Police Inspector was illegal in that it was indefinite and vague. It was urged that since the warrant was illegal no presumption could be raised under s. 7 of the Prevention of Gambling Act. As regards the evidence of Chana--basayya and Irabhadreppa it was contended for the defence that their evidence was inadmissible and in support of that contention it was suggested that the provisions of s. 10 of the Prevention of Gambling Act could not apply to those witnessess having regard to the defect in the warrant under which the raid and serch were made. It was also suggested that their evidence should not be believed and that the evidence of the Police Inspector and the panch in so far as it suggested that they saw the play of cards before they raided the house should be discarded since the said fact had not been mentioned by them in the panchanama. Most of the accused admitted their presence, but explained it on the ground that the house in question was being used for "Rivayat", in other words, some musical instruments was going on in the room and no cards were being played at all. Accused No. 1 suggested that he had gone to the house after he heard some commotion and he said that when he went there he found the police making a panchanama. Accused No. 15 suggested that he went there at the time when the search and the panchanama were being made and that he was under the impression that he was taken there as a panch.

The learned Magistrate before whom the case was tried held that the police had raided the house as alleged by them, but that the warrant under which the raid was effected and the search was made was illegal. As a result his conclusion was that the prose--cution were not entitled to the presumption under s. 7. Dealing with the case on the merits without the assistance of the presumption the learned Magistrate came to the conclusion that the prosecution evidence was not sufficient to bring home to the accused the offences charged against them. Accordingly he acquitted all the accused and ordered them to be discharged. It is this order which has given rise to the present appeal.

The learned Government Pleader has contended that the warrant in this case was not defective and that the prosecution was ---

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entitled to a presumption under s. 7 of the Act. The warrant shows that a co,plaint was made to the District Superintendent of Police of Dharwar who on receipt of the complaint had reason to suspect that "House No. 458 Javal Street, Gadag is used as a common gaming-house " and who accordingly proceeded to authorise the police officer mentioned in the warrant to raid the place and make a panchanama. The learned Magistrate inspected the scene of offence and as a result of his inspection he found that in the locality there were houses in different rows ranging from 458/1 to 458/164. The house raided was House No. 458/160. Of this figure 160, 6 was clearly visible, whereas 1 and 0 were not so clearly visible. It was also found that there was no house in the locality which bore the number 458 as mentioned in the warrant. In the warrant besides giving the number of the house and the name of the street where the house was alleged to be situated no further description of the house was mentioned. It is well settled that when issuing warrants under s.6 of the Gambling Act care must al--ways be taken to describe the house or the room of the room or the place authorised to be raided with such particularity as to leave no room for doubt as to its identify. In Emperor v. Abasbhai 50 Bom.344, while dealing with a warrant of a similar nature it was held that the warrant issued under s. 6 which described the by a wrong number and had nothing else to identify it was illegal and that the presumption under s. 7 could not be made in a case started as a result of the raid made under such a warrant. The learned Government Pleader has contended that this case is similar to the case in Emperor v. Krishna Rutna Dalvi, 6 Bom.L. R. 52, and Emperor V. Jhunni, 2 Cr.L.J. 243. In those cases, howe--ever, apart from the misdescription on which the accused accused relied there was other description which tended to identify the property in question without any ambiguity or uncertainty. In the present case there is no such description from which the identify of the house could be reasonably inferred. The number of the house is the only description we find in the warrant and since that description is descovered to be wrong it seems to us that the warrant must be regarded as invalid under s. 6 of the Prevention of Gambling Act. That being so, the prosecution are

not entitled to a presumption under s. 7 of the Act.

On behalf of the accused Mr. Madbhavi has contended that the evidence of Chanabasayya and Irabhadreppa who were arrested since they were present along with the accused in this case in the house at the material time is inadmissible under s. 10 of the Prevention of Gambling Act, and in support of his contention he has relied upon the decision of this Court in Emperor v. Babilal Balwant, 17 Bom.L.R. 1078. In the said case at the trial the trying Magistrate permitted two of the accused persons to give evidence against the remaining accused persons and it was held that the provisions of s. 10 of the Prevention of Gambling Act do not enable a trying Magistrate to examine any of the accused persons, while he is still in the position of an accused person and has obtained no order of discharge or acquittal. It must be mentioned that the persons who were examined in that case were accused along with the other persons in the very case in which they tendered evidence, and it was held consistently with the provisions of s. 342 of the Criminal Procedure Code that oath could not be administered to persons in the position of co-accused, in the trial where they along with others are being tried in a criminal Court. The position with regard to the two witnesses in this case is, we think, very much different. It is true that they were arrested as a result of their presence in the room on the material date. But no charge sheet has been sent against them in the present case and in fact no charge sheet has been sent against them at all so far. That being so, we are unable to hold that the position with regard to these two witnesses can in any manner be regarded as similar to the position with regard to the persons who were examined in Emperor v. Babilal Balwant, 17 Bom.L.R. 1078.

Mr. Madbhavi has then contended that since the prosecution sought to examine these witnesses under s. 10 of the Prevention of Gambling Act they must show that the warrant under which the original raid took place was valid. S. 10 provides that "every person who shall have been concerned in any gaming contrary to this Act, and who shall be examined as a witness by or before a Magistrate on the trial of any charge against the owner,

keeper or occupier or other person having the care or management of any common gaming-house, toughing such gaming, and who upon such examination shall make true and faithful discovery to the best of his knowledge of all things as to which he shall be so examined, and who shall thereupon receive from the said Magistrate a certificate in writing to that effect, shall be freed from all prosecution under this Act for anything done before that time in respect of such gaming." Mr. Madbhavi argues that since the warrant under which the raid took place was illegal and since the prosecution are not entitled to the presumption under s. 7 the two witnesses sought to be examined by them under s. 10 could not legitimately be so examined because at the outset they cannot be deemed to be concerned in any gaming contrary to the Act. In other words the argument is that before s. 10 could be legitiamtely applied it must be shown that the warrant under s. 6 was valid and that a presumption under s. 7 therefore arises. We think this con--tention is well founded. Having held that the warrant under which the raid was made by the police officer in this case was illegal, it would, we think, be impossible to assume at the outset that the two witnesses tendered by the prosecution in this case as having been concerned in any gaming contrary to the Act could be properly regarded as so concerned in such gaming.

Mr. Madbhavi has next contended that if s. 10 is inapplicable to the evidence sought to be given by these two witnesses the said evidence should be regarded as absolutely inadmissible. We are unable to accept this contention. As I have said above these two persons were undoubtedly arrested along with the other persons who have been charge-sheeted in this case. They have not, however, been proceeded against so far. It seems to us that persons in the position of these two witnesses continue to be competent witnesses since there is nothing either under the Evidence Act or under the Criminal Procedure Code which makes them incompetent witnesses. Under s. 133 of the Indian Evidence Act accomplices are regarded as competent witnesses, though the value to be attached to their evidence may not be very great. Similary under the provisions of s. 5 of the Indian Oaths Act oath can be administered to all persons except in cases where proceedings are pending against them in a

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criminal Court. In Empress v. Durant, 23 Bom. 213, a European British Subject was charged together with others who were citizen of India under ss. 384,385 and 389 of the Indian Penal Code with conspiring to commit extortion. Durant claimed to be tried by a mixed jury under s. 450 of the Criminal Procedure Code. The other accused then claimed to be tried separately under s. 452. The trial of Durant then proceeded, and at the close of the case for the prosecution, he proposed to call as his witnesses the persons who had been charged with him and who were awaiting their trial. They objected to be called. It was held that the accused Durant was entitled to call them as witnesses and to examine them on oat It was pointed out that the words "the accused" in cl. 4 s. 342 of the Criminal Procedure Code mean the accused then under trial and under examination by the Court. To the same effect is the decision of the Calcutta High Court in Akhoy Kumar Mookerjee V. Emperor, 45 Cal. 720. It was held that s. 5 of the Oaths Act and s. 342 (4) of the Criminal Procedure Code apply only to the accuse actually under trial at the time. Such a person cannot, therefor be sworn as a witness, and no accused jointly tried is a competent witness for, or afainst, the co-accused. But when accused persons are tried separately, each one, though implicated for the same offence, is a competent witness at the trial of the other. The provisions of s.5 of the Indian Oaths Act and of s. 342 (4) of the Criminal Procedure Code were referred to and it was observed that the exception provided by the said provisions goes no further and has no application to an accused person who is not at the time und trial. Accordingly when two persons, though they may be accused of complicity in the same offence, are tried separately, each is a competent witness at the trial of the other. That being so, it seems to us that Chanabasayya and Irabhadreppa were competent witnesses and their evidence must be regarded as admissible in this case. It is obvious that they are no better than accomplices and i

would be unsafe to rely upon their evidence by itself. But that, we think, is no reason for holding that their evidence is ~~max~~ inadmissible.

In this case the prosecution rely upon the evidence of the panch and the Police Inspector in support of the panchanama itself. The panch was an assistant school teacher in Betgeri Boys' School. He had been serving as a teacher for the last 20 years and on reading his evidence as a whole he appears a respectable and truth--ful witness. He says that when he had gone near about the place which was ultimately raided in order to have soda-water as usual he was called by the Police Inspector to accompany the police party to make a panchanama. He mentions the other two panchas who accom--panied the party along with him. As they approached the house they found that the door had been closed. There were two windows on each side of the door. "Through those windows," says the witness, "I saw gas light burning inside and the present accused. The play card game was going on." Then they proceeded to open the front door and when they went inside all the persons present stood up in confusion. Thereafter the panchanama was made and the witness describes in detail how the things were found and ascertained and reference was made to them in the panchanama as they were seen at the place. In his cross-examination it does not seem to have been suggested to this witness that it was impossible for any outsider standing near about the house to see what was going on inside the house through the two windows mentioned by the witness. The only point which was elicited in the cross-examination of this witness was that no reference was made in the panchanama to the fact that the panch had seen the play of cards going on inside the house eve before the door of the house was opened. Similarly the Police In--spector has sworn that he saw the play of cards going on inside the house before he along with the panchas entered the house afte getting the door opened. Apparently the learned Magistrate was

impressed with the contention urged on behalf of the defence before him that the failure of the panch to refer to this circum-stance in the panchanama showed that the witnesses may not have seen the card play going on as they now allege. It seems to us that the learned Magistrate was wrong in discrediting the statement of the panch witness in this particular case almost solely on the ground that he did not mention this fact in the panchanama. We are disposed to think that facts seen by the panch or the Police officer before the raid took place would not normally or legitimately be included in the panchanama. In the ordinary course the panchanama would disclose facts observed by the panchas after the raid in question was made. As to the facts seen by the panch or the Police officer before the panchanama was made, that would be a matter of evidence and it would not be proper to burden the panchanama with a recital of those facts. That being so, we think the learned Magistrate was wrong in disb-elieving the evidence of the panch and the Police Inspector on this material point. We hold that the said two witnesses are speaking the truth when they say that they both saw that the play was going on inside the house before they raided it. There is another point on which criticism was levelled against the panchanama before the learned Magistrate. The panchanama refers to the fact that the door of the house was got opened before the party got inside. Both the panch and the Police Inspector have stated that the door was closed, but had not been chained from inside so that it could be opened by giving it a push. The learned Magistrate thought that if the large number of persons inside the room were gambling it is unlikely that the door would not be chained from inside. From the evidence in the case it seems to us that the assumption made by the learned Magistrate in this behalf is not justified. It appears that the persons taking part in the game inside the house were not at all appre-

-hensive that any raid would be made. In fact the evidence suggests that persons were getting in and out of the room, as the play was proceeding inside the room. That being so, we see no reason to disbelieve the evidence of the panch and the Police Inspector.

The panchanama sets out in details the things that were discovered in the room and also sets out the respective amounts found with the persons present in the room. Some of the articles found at the search I have already mentioned. The manner in which the hand-bag was kept locked and the contents of the said bag lead considerable strength to the prosecution case that the contents of the said bag represent the profits which were to go to the persons who were running the common gaming-house in this case. Card board coupons of four annas each suggest the same inference. There were the playing cards; a large number of the accused persons present on the scene had different amounts with them. There was a sli of account showing the dealings resulting from the play of cards and a note-book in which some entries about the same were made. The time when the play was going on was midnight and the persons present had collected not only from the neighbourhood, but some of them had come from neighbouring villages as well.

These facts are sought to be supported by the evidence of the two persons Chanabasayya and Irabhadreppa already mentioned by me. Chanabasayya is serving as a Karkun in the Gadag-Betgeri Municipality. He says that he knew all the accused by fact and he describes in details the nature of th game called "Andar-Bahar" (in and out), otherwise called "Manna". The details spoken to by this witness clearly indicate that there was no element of skill in the game at all. He says that he had been present for about an hour in the room before the raid took place and the panchanama was

made. Both this witness and Irabhadreppa who was similarly arrested along with him have, in giving details, made an effort to minimise the part played by accused No. 1 in this affairs. In fact Chanabasayya did not mention accused No.1 at all when his statement was recorded under s.164 of the Criminal Procedure Code. Irabhadreppa suggested that accused No. 1 had come in the room just a few minures before the raid took place. It must be pointed out that the evidence of both these witnesses as refards the identity of the persons who were running the show is discrepant and not at all satis--facrory. Indeed the learned Government Pleader has conceded that on the evidence as it stands it would be difficult for him to press his case against five of the accused under s.4 of the Prevention of Gambling Act. The unsatisfactory chara--cter of the evidence of these two witnesses on this matter, however, does not, we think, affect the statements made by them as regards the nature of the game. On that point they have not been cross-examined at all and it would not be unreasonable to assume that the accused did not wish to challenge the statements that these witnesses made as regards the manner in which this game Anadar-Bahar was being played that night in that room.

Since the learned Government Pleader has not pressed the prosecution case against the five accused under s.4 of the Prevention of Gambling Act it seems unnecessary to consider the evidence bearing on that point. It may, however, be menti--ed that the prosecution evidence as regards the persons who have rented the room as well as the persons who are running th show and are earning the profits out of the game is not very satisfactory. It must, therefore, be held that the prosecution have failed to prove their case against accused Nos.1, 25, 29 30 and 31 under s. 4 of the Act. It is true that these accused

PERSONS

persons were charged only under s.4 of the Prevention of Gambling Act. It seems to us, however, that if on the evidence we are satisfied that they were guilty of an offence punishable under s. 5 of the Act no prejudice or injustice would be caused to the accused because it is not likely that if the alternative charge was levelled against them they would have had to lead to any other or additional evidence in rebuttal of the prose--cution case.

Proceeding therefore to deal with the case against all the accused under s. 5 of the Prevention of Gambling Act it is necessary to see whether the prosecution have proved as against each one of them that he was found in any common gaming-house, gaming, or present for the purpose of gaming. A common gaming house means a house, room or place in which any instruments of gaming are kept or used for the profit or gain of the person owning, occupying or keeping such house, room or place or of the person using such house, room or place whether he has a right to use the same or not, such profit or gain being either by way of a charge for the use of the instruments of gaming or of the house, room or place or otherwise however. Since the prosecution are not entitled to the presumption under s. 7 in this case, it is necessary that they ought to establish the fact that the house which was raided on the night in question was such a common gaming house. Having regard to the evidence of the panch and the Police officer and to the things and articles discovered in the room when the panchanama was made it seems to us that the prosecution have established the fact that the house in question was a common gaming house. It is tru that they have not been able to lead any satisfactory evidence as to the identity of the person who was ultimately going to reap the profit or gain out of this gaming house, though the presence of the box with a large slit on its top and the manner in which the accounts were kept and the calculations were made with a view to ascertain the amount of profit put through the slit of the box leave no room for doubt that the contents of th box were intended to be given to some persons as profit or gain

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as a result of the gaming which was taking place in the said hous it seems to us that the fact that the prosecution have failed to show that any of the accused persons in this case were entitled t receive the profit does not necessarily enable the accused to say that no case could be held proved against them under s.5. As I have stated above, on the evidence in this case we are satisfied that the house in which the accused were found on that night was used as a common gaming-house. Besides, the time at which the were found is a circumstance on which the prosecution are entitle to rely. In dealing with cases under s. 5 inferences which could legitimately be drawn under s. 114 of the Indian Evidence Act can we think be drawn if it appears to the Court that the facts prove legitimately or reasonably lead to those inferences. Having regar to the facts set out above it seems to us that it may not at all be unreasonable to hold that the persons present in the room at that time were so present for the purpose of gaming. The nature of the game as deposed to by the two witnesses Chanabasayya and Irabhadreppa shows that a large number of persons can take part i it . It seems to us that the evidence in the case clearly shows that all the persons who were present in the house were taking part in the Andar-Bahar game which was being played there.

The case of accused No. 31 stands apart from the cases of th rest of the accused. He was not found present in the room at the time when the police party raided the house and the information which the investigating officer received in the course of the investigation and to which he has deposed in the case does not appear to justify the inference that accused No. 31 had anything to do with the gaming in question. All the other accused persons however, are proved to have been present in the room. Some of the had cash with them while other were not found to be in possession of cash. It may be pointed out that all the accused persons made a common defence suggesting that some sort of music was being playe in the house at that time and it was to hear the music that they had gathered there. In support of this plea they examined certain witnesses residing in the locality. The evidence of those witness-es, however, is obviously unsatisfactory. It is clear that the said witnesses have come to depose th some music having been heard

by them just with a view to help the accused. In this connectio it is remarkable that when the house was raided and the pancha--nama was made no musical instrument was discovered in the room When the prosecution witnesses were examined no attempt was made to suggest by putting some questions to them in cross-examination that some musical instruments may have been unnoticed at the time when the raid was made. They were not asked whether they heard any music which according to the defence was being played at that time. It seems to us that the plea which has bee made by almost all the accused in this case is obviously untrue and the explanation for their presence at midnight in the house in the circumstances deposed to by the prosecution witnesses seems to be consistent with the prosecution case and inconsisten with the innonence of the accused. On that view of the matter i appears to us that no idstinction could properly be made betwee the case of the accused who were found in possession of cash an that of those with whom no cash was found. That being our view, we think the learned Magistrate was wrong in holding that the prosecution had failed to prove their case against the accused.

Accused No.23 was absent throughout the trial and no char has been framed against him. No order need therefore be passed in regard to him.

Accused No. 31 is acquitted.

The rest of the accused are convicted of an offence punishable under s.5 of the Prevention of Gambling Act. Having regard to all the circumstances in this case we think the ends of justice would be met if we sentence accused No.1 to pay a fine of Rs.100/- or in default to undergo rigorous imprisonment for three weeks. The other accused are sentenced to pay a fine of Rs.25/- each or, in default to undergo rigorous imprisonment for two weeks.

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Criminal Appeals.
In the High Court, Bombay..
against acquittal (Dharwar).

GOVERNMENT OF BOMBAY.
Legal Department,
Resolution No. 7311
Bombay Castle, 26th October 1946.

Read Government Resolution, Legal Department No. 6596, dated the 7th September 1945.

Letter from the Government Pleader, High Court, Bombay, No. 2902, dated the 10th September 1946 -- Stating that criminal Appeal No. 410 of 1945 filed by Government against the acquittal of the Accused in the case noted in the margin,

In the Court of Resident Magistrate, First Class, Gadag. Criminal Case No. 147 of 1944. Crown vs. Jandisab Advisal Bhavikatti and 30 others.....Accused. (Offence under sections 4 and 5 of the Bombay Prevention of Gambling Act, 1887).	

was heard by the High Court, Bombay, on 5-9-1946 when the following order was passed :-

"The Court partly allows the appeal, sets aside the order of acquittal passed by the Resident Magistrate, First Class Gadag in favour of accused Nos. 1 to 22 and 24 to 30, convicts them under section 5 of the Bombay Prevention of Gambling Act and sentences accused No. 1 to pay a fine of Rs. 100, or in default to undergo R.I. for 3 weeks, and accused Nos. 2 to 22 and 24 to 30 to pay a fine of Rs. 25/- each or in default to undergo R.I. for 2 weeks. The Court confirms the order of acquittal, passed by the Resident Magistrate, in favour of accused No. 31."

Letter from the Government Pleader, High Court, Bombay, No. 3216, dated the 10th October 1946-- Forwarding an uncertified copy of the High Court Judgment.

RESOLUTION. - The result of the appeal is recorded.

By order of the Governor of Bombay,

Original A. R. Khan,

Deputy Secretary to Government.

Issued 26/10

To

The Home Department,
The Commissioner, Southern Division,
The District Magistrate, Dharwar.

Submitted for signature 19/10

BM.

Submitted after issue
2. File in CrA-Dnr/46

Bvs
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CrA-Dnr/46
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by them just with a view to help the accused. In this connection it is remarkable that when the house was raided and the pancha--nama was made no musical instrument was discovered in the room. When the prosecution witnesses were examined no attempt was made to suggest by putting some questions to them in cross-examination that some musical instruments may have been unnoticed at the time when the raid was made. They were not asked whether they heard any music which according to the defence was being played at that time. It seems to us that the plea which has been made by almost all the accused in this case is obviously untrue and the explanation for their presence at midnight in the house in the circumstances deposed to by the prosecution witnesses seems to be consistent with the prosecution case and inconsistent with the innonence of the accused. On that view of the matter it appears to us that no idstinction could properly be made between the case of the accused who were found in possession of cash and that of those with whom no cash was found. That being our view we think the learned Magistrate was wrong in holding that the prosecution had failed to prove their case against the accused.

Accused No.23 was absent throughout the trial and no charge has been framed against him. No order need therefore be passed in regard to him.

Accused No. 31 is acquitted.

The rest of the accused are convicted of an offence punishable under s.5 of the Prevention of Gambling Act. Having regard to all the circumstances in this case we think the ends of justice would be met if we sentence accused No.1 to pay a fine of Rs.100/- or in default to undergo rigorous imprisonment for three weeks. The other accused are sentenced to pay a fine of Rs.25/- each or, in default to undergo rigorous imprisonment for two weeks.

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Opinion in the case of Imperator Vs. Sanganbassappa Shambappa & others.

This is certainly not a case in which I can advise an appeal. An appeal, if filed, is not likely to succeed at all First and foremost I am likely to be faced with the difficul-ty about the proper publication of the District Magistrate's order No. W.A.R of 1-9-43 prohibiting removal of paddy from one Taluka to another Taluka without a permit. Mere publication in the 'Sanyukta Karnatak' may not, in law, be enough. That point was not raised in the trial Court, but if an appeal is filed in the High Court the accused , with better legal aid are bound to raise the point, and the burden is on the prosecution to prove publication strictly as required by rule 119 of the Defence of India Rules. I am afraid there is no material on the record to prove the publication of the Order, as required by rule 119.

Apart from this initial difficulty, what is the prosecution case,and how has it been proved ? One Dawalsab, a police constable at Haveri, who is not examined, told the P.S.I. that he saw a bus go past him towards Agdi, and he surmised that the bus was carrying paddy bags. The first information given by this vigilant constable and recorded by the P.S.I., the prime mover of the piece, is not produced. This Dawalsab otherwise a very important witness is kept back. The P.S.I. tried to track the bus on a push bicycle; the bus was so quick that he met the bus on its return journey. The quantity of the paddy found in the house of accused No.1 was pretty large - 54 bags. Where did this paddy come from ? In the Dharwar District, I suppose, everybody is required to declare his stock. It is not suggested that accused No.1 had not declared his stocks. I gather that the mill from where these bags are alleged to have been brought by the accused, stored Government grain. There is no suggestion that the stocks there were illegally depleted to the extent of so many bags. A Government Depot of grain must miss this large disappearance!

I fail to understand how the P.S.I. was justified in putting in his lock up the two accused and the two coolies.

If the P.S.I. had information that an offence was committed he could have formally arrested the two accused and released them on bail. The whole thing has an ugly look about it. The investigation, to say the least, was unsatisfactory, and obvious things were not done. Probably, there was no case to investigate into.

I am constrained to say that this seems to be an attempt on the part of the P.S.I. to patch up a case on the bare fact that these 54 bags were found in the house of accused No.1 in the early morning of the 2nd of December 1945.

I certainly do not want this case to be taken to the High Court and thus expose the several infirmities from which the prosecution case suffers. The true facts certainl could not be as unfolded in the trial Magistrate's Court. Even if the evidence of the two Hamals be accepted, the case does not carry any conviction, and no Court is going to accept such tainted evidence. Moreover, there is a very material contradiction regarding the No. of the bus which went in and out of the mill compound in the early hours of 2-12-45.

To put it mildly, the guilt of the accused is not satisfactorily brought home to them and I cannot advise an appeal against their acquittal.

Bombay,) B J Shakor
16th October 1946.) for Government Pleader, High Court.

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" True copy - Original papers being of bad quality - Destroyed."

Superintendent,
D Branch, Legal Department.

Cr A. Dwr/4.
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